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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 568

OSCAR R. EWING, FEDERAL SECURITY ADMINISTRATOR, ET AL.,

Appellants,

vs.

MYTINGER & CASSELBERRY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT OF APPELLEE ON APPELLANTS' JURISDICTIONAL STATEMENT

CHARLES S. RHYNE,
LESTER L. LEV,
Counsel for Appellee.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5208-48

MYTINGER & CASSELBERRY,

Plaintiff,

vs.

OSCAR R. EWING, ET AL.,

Defendants

STATEMENT OF APPELLEE ON APPELLANTS' JURISDICTIONAL STATEMENT

While Appellee has no desire to oppose jurisdiction herein, it believes the Court's attention should be specifically called to the existence of inaccurate factual statements by the Appellants in their "Statement as to Jurisdiction". These inaccuracies are revealed by the Special Three-Judge Court's comprehensive "Findings of Fact" and the record herein. Appellee assumes that the proper place to detail these inaccuracies will be in its brief if the Court takes jurisdiction herein, but did not want this Honorable Court to conclude that it concurred in Appellant's statements by silence at this time.

Certain references to the Decision of the Special Three-Judge Court are also inaccurate and highly prejudicial in that they attempt to inject public health considerations

which are non-existent in this case. For example, on page 2 of their Statement, in quoting Section 304(a) of the Food, Drug and Cosmetic Act, the Appellants say the principal questions presented include constitutionality of certain quoted language. In this language they include provisions relating to the right to make multiple seizures of articles "dangerous to health" and those having "fraudulent" labeling. On page 9 Appellants refer to "dangerous articles", "fraudulent articles" and "seriously misleading articles" and on page 13 Appellants refer to "dangerous product", "fraudulent product" or a "materially misleading product" evidently hoping the Court will conclude that this case involves such facts. By their answer to Paragraph 17 of the Complaint Appellants specifically admitted that:

> ". . . Nutrilite Food Supplement is not dangerous to health and that the labeling and advertising thereof is not and never has been fraudulent . . . ."

The only part of the statute invalidated as applied to Appellee under the facts herein is the specific statutory *exception* to the statutory prohibition against more than one seizure, which exception allows more than one seizure in those cases where the Administrator determines that he has probable cause to believe that "labeling" is misleading to the injury or damage of the purchaser or consumer. The decision in this case does not involve the power of Appellants to make *unlimited* seizures of "dangerous products" or articles, or *unlimited* seizures of "fraudulent products" or articles with "fraudulent" labeling as no such facts are involved.

The disproved "misleading" charge related solely to Appellee's advertising pamphlet, and not to the "article" or "product".

Appellants suggest summary disposition rather than full consideration of their appeal. This suggestion is made in an evident hope of preventing this Honorable Court from fully appreciating and inquiring into the shocking actions of Appellants as revealed by the record herein which so amply supports the Court's Findings. It is believed that this is a case where the whole truth should be brought before the Court by proper briefs and argument. The argument before this Honorable Court on May 16, 1949, related to the right of the trial court to receive evidence on the merits and did not relate to the merits of either the issue on arbitrary, capricious and oppressive conduct of Appellants or the issue on constitutionality of the invalidated provisions as applied to Appellees. The facts were not before the Court, and this Court allowed a trial so that the facts could be fully developed. Now the facts have been fully proved and these issues can for the first time be presented in briefs and arguments. Actually, Appellants have no merit in their contentions, and that is the reason they again seek to avoid a full exploration of the merits by this Court.

Respectfully submitted,

CHARLES S. RHYNE,
LESTER L. LEV,
Attorneys for Appellee.

January 21, 1950.